

## THE CONTINUING SAGA OF PUGET SOUND CHINOOK HARVEST

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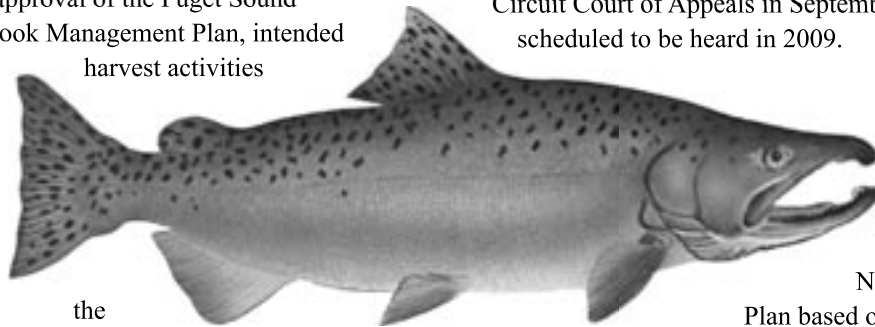
In October 2006, Wild Fish Conservancy, the Salmon Spawning & Recovery Alliance, the Native Fish Society, and the Clark-Skamania Flyfishers filed a complaint in the US District Court, Western District of Washington, against NOAA Fisheries, challenging the federal agency's approval of the Puget Sound Comprehensive Chinook Management Plan, intended to guide salmon harvest activities that impact Puget Sound chinook (*Oncorhynchus tshawytscha*) until 2010. The Plan was developed jointly by WDFW and the PS Treaty Tribes as a joint resource management plan under the ESA 4(d) rule developed for the Puget Sound chinook Evolutionarily Significant Unit (ESU).

In the 2007 issue of *Wild Fish Journal*, attorney Svend Brandt-Erichsen described the details of this suit. Briefly, WFC and its co-plaintiff's argued that the Plan permits illegal take of ESA-listed PS chinook during authorized tribal and non-tribal fisheries in Puget Sound and that NOAA Fisheries violated the ESA when it approved the Plan and when it concluded in its subsequent Biological Opinion that its approval of the Plan would not jeopardize the survival and recovery of the ESU. We further argued that in analyzing the likely impacts of the Plan, NOAA failed to follow appropriate criteria regarding the requirements for recovery of the ESU that were developed by the NOAA-appointed Puget Sound Technical Recovery Team (TRT). NOAA also subsequently ignored information regarding harvest impacts under the Plan that required NOAA to re-initiate consultation. The federal defendant's were joined in their defense by *amici* (friends of the Court) WDFW and the PS Treaty Tribes, the Plan's authors.

The case was assigned to Judge Robert Laznik of the US District Court in Seattle. Appropriate legal documents were filed in the spring of 2007 and oral arguments were heard in the fall of 2007. On March 20,

2008 the Court ruled in favor of the federal Defendants on all counts. The decision relied heavily on the judicial standard requiring courts to defer "substantially" to agency expertise in matters of scientific controversy, especially where federal Trust Responsibilities to Treaty Tribes are involved, as is the case in the Chinook Management Plan.

WFC and our co-plaintiff's filed a timely notice of Intent to Appeal. The Appeal was filed with the Ninth Circuit Court of Appeals in September 2008 and is scheduled to be heard in 2009.



WFC believes that the District Court erred by extending deference to NOAA's approval of the Plan based on little more than the mere assertion by NOAA officials that they conducted the appropriate analyses of the Plan, looked at the relevant data, and concluded to the best of their abilities that the Plan would not jeopardize the survival or recovery of the ESU. This seems to us a far too broad interpretation of the deference standard in that it amounts to little evaluation whatsoever of the quality of an agency's reasoning in reaching controversial conclusions. We believe this error is particularly glaring in this case in view of the contradictions between the analyses of the TRT, which includes several of NOAA Fisheries' own scientists, and the recovery standards established by its approval of the Puget Sound Salmon Recovery Plan that was based on the analyses of the TRT on the one hand, and the analyses in the documents approving the Plan on the other.

It is important to understand that this case does not involve a conflict between our analyses of the harvest plan, and NOAA and the co-managers' analyses. This is not a battle of competing scientists. Rather it is a review of the administrative record in which we argue that NOAA has failed to analyze the plan in a way that is consistent with its own expert analyses of the survival and recovery needs of the ESU. In considering how to extend deference to federal agencies' expertise, the Court cannot avoid assessing the quality and consistency of an agency's applications of its own analyses. It is here where we believe the District Court failed. ❐